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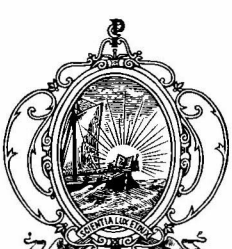

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MUḤAMMAD B. JARĪR AL-ṬABARĪ'S *AL-BAYĀN ʿAN UṢŪL AL-AḤKĀM* AND THE GENRE OF *UṢŪL AL-FIQH* IN NINTH CENTURY BAGHDAD

DEVIN J. STEWART

The first two centuries of ʿAbbasid rule, between 750 and 950 CE, witnessed what we may call the Rise of Theory. During this period, all the known intellectual disciplines — geometry, astronomy, medicine, philosophy, grammar, lexicography, and other fields — were theoretically formalized, organized, and rationalized, both in content and method.[1] The Islamic religious sciences, including theology, law, scriptural exegesis, oral traditions of the Prophet, and mysticism, were not left behind by this general trend; all were given a theoretical foundation during this same period. In the case of Islamic law, that theoretical foundation was embodied in a genre of works termed *Uṣūl al-Fiqh* ('the Sources of the Law'), which would become an indispensable part of Islamic legal education, retaining much the same form until the twentieth century. Unfortunately, the seminal works of *Uṣūl al-Fiqh* have nearly all been lost, thus obscuring the process of theoretical formulation during this formative period for posterity. In order to trace the development of Islamic legal theory, the historian must therefore rely on references in bibliographical, biographical, and other works, as well as fragments of early manuals preserved in later texts. The present study focuses on *al-Bayān ʿan Uṣūl al-Aḥkām*, a manual of jurisprudence by Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī (d. 310/923). Evidence collected here concerning this work suggests that the genre of *Uṣūl al-Fiqh* was well established and had begun to play an important role in Islamic legal education already by the late Ninth Century. Furthermore, features of the *Bayān* and other works point to the existence of a yet earlier Ḥanafī/Muʿtazilī tradition of *Uṣūl al-Fiqh* of which only traces survive in the extant sources.

[1] DIMITRI GUTAS, *Greek Thought, Arabic Culture: The Graeco-Arabic Translation Movement in Baghdad and Early ʿAbbāsid Society (2nd-4th/8th-10th centuries)*, London, 1998, dates this development between 850 and 950 CE, but it probably began earlier.

The main hindrance to the investigation of the history of the particular genre of *Uṣūl al-Fiqh* is the paucity of extant works from the crucial formative period. The earliest extant, published works in the *Uṣūl al-Fiqh* genre date from the mid- to late Tenth Century: *al-Fuṣūl fī 'l-Uṣūl* by Abū Bakr Aḥmad b. ʿAlī al-Jaṣṣāṣ al-Rāzī (Ḥanafī, d. 370/980), *al-Muqaddima fī Uṣūl al-Fiqh* by Abū 'l-Ḥasan ʿAlī b. ʿUmar b. al-Qaṣṣār al-Baghdādī (Mālikī, d. 398/1008), *al-Taqrīb wa-l-Irshād fī Tartīb Ṭuruq al-Ijtihād* by Abū Bakr Muḥammad b. al-Ṭayyib b. Muḥammad al-Bāqillānī (Mālikī, d. 403/1013), and volume XVII of *al-Mughnī* by al-Qāḍī ʿAbd al-Jabbār b. Aḥmad al-Hamadhānī al-Asadābādī (Shāfiʿī, d. 415/1024).[2] The earliest of these, *al-Fuṣūl*, dates to between 340/952 and 370/980. Though nearly complete, this work lacks the introduction and part of the early chapters. *Al-Mughnī*, completed between 360/971 and 380/990, is missing a large section from the beginning and probably from the end as well. *Al-Taqrīb wa-l-Irshād* is also incomplete, lacking the introduction and part of the beginning; the second half, extant in manuscript, remains unpublished. The fact that the introductions are missing is most unfortunate, for they undoubtedly contained information about the earlier genre. Ibn al-Qaṣṣār's *Muqaddima*, while complete, is much less substantial than the other three texts. The size and complexity of these works suggest that *Uṣūl al-Fiqh* was already a mature field by the time they were written.

Recent scholarship on Islamic legal theory places the beginnings of the *Uṣūl al-Fiqh* genre in the Tenth Century. Several scholars of Islamic jurisprudence reject the traditional view that the genre of *Uṣūl al-Fiqh* was inaugurated by al-Shāfiʿī (d. 204/820) with his composition of the famous *Risāla*, arguing instead that it began about a century and a half later. The *Risāla*, they point out, is so different in structure and intent from the classical, well-known *Uṣūl al-Fiqh* works from later centuries that it could not possibly have served as the starting point for the genre.

[2] AL-JAṢṢĀS, *al-Fuṣūl fī 'l-Uṣūl*, ed. ʿU.J. AL-NASHMĪ, Kuwait: Wizārat al-Awqāf wa-l-Shuʾūn al-Islāmīya, 1985-1993; IBN AL-QAṢṢĀR, *al-Muqaddima fī Uṣūl al-Fiqh*, ed. MUHAMMAD B. AL-ḤUSAYN AL-SULAYMĀNĪ, Beirut: Dār al-Gharb al-Islāmī, 1996; AL-BĀQILLĀNĪ, *al-Taqrīb wa-l-Irshād 'al-Ṣaghīr'*, ed. ʿA.B. ʿALĪ ABŪ ZUNAYD, Beirut: Muʾassasat al-Risāla, 1993-1998; Imām al-Ḥaramayn AL-JUWAYNĪ. *Kitāb al-Ijtihād min Kitāb al-Talkhīṣ*, Damascus: Dār al-Qalam, 1987; Imām al-Ḥaramayn AL-JUWAYNĪ, *Kitāb al-Talkhīṣ fī Uṣūl al-Fiqh*, ed. ʿA.J. AL-NIBALĪ and S.A AL-ʿUMARĪ, Beirut: Dār al-Bashāʾir al-Islāmīya; Mecca: Maktabat Dār al-Bāz, 1996; AL-QĀḌĪ ʿABD AL-JABBĀR, *al-Mughnī fī Abwāb al-Tawḥīd wa-l-ʿAdl: al-Sharʿīyāt*, ed. Ṭ. ḤUSAYN and A. AL-KHŌLĪ, XVII, Cairo: Wizārat al-Thaqāfa, 1961. An incomplete version of the same author's popular manual of jurisprudence, *al-ʿUmad*, is extant in manuscript according to F. SEZGIN, *Geschichte des arabischen Schrifttums*, I, Leiden 1967, p. 625.

In addition, they claim, no *Uṣūl al-Fiqh* works were produced for the next century or more after al-Shāfiʿī's death.[3] Hallaq writes:

> There is ample evidence in the sources to show that even as late as the end of the Third/Ninth Century, legal theory as we now know it, and as we assume it to have issued from Shāfiʿī's work, had not yet come into existence. It is striking that that century produced no complete treatise on *Uṣūl al-Fiqh*.[4]

Chaumont concurs: 'it should be noted that the *Risāla* remained a dead letter for more than a century and that the science of the *uṣūl al-fiḳh*, inherited from al-Shāfiʿī, was not really developed until after the 4th/10th century'.[5] Calder sums up the current state of the field: 'the literary genre of *uṣūl al-fiḳh* is continuous from the mid-4th/10th century ... to the 13th/19th century'.[6] According to Hallaq and Reinhart, the Shāfiʿī jurist Ibn Surayj (d. 306/918) played a leading role in the systematization of Islamic legal theory that shaped the development of *Uṣūl al-Fiqh*. Hallaq maintains that the first *Uṣūl al-Fiqh* works were produced by students of Ibn Surayj in the early Tenth Century. Reinhart writes that Ibn Surayj authored a manual of *Uṣūl al-Fiqh* and was the first to discuss jurisprudence with the logical rigour of the dogmatic theologians.[7] In a recent study, the present author has suggested that several manuals of *Uṣūl al-Fiqh* were written already in the Ninth Century, presenting a partial reconstruction of *al-Wuṣūl ilā Maʿrifat al-Uṣūl*, a manual of jurisprudence by Abū Bakr Muḥammad b. Dāwūd al-Ẓāhirī (d. 297/910).[8] Arguing along the same lines, this study focuses on al-Ṭabarī's *al-Bayān ʿan Uṣūl al-Aḥkām* and suggests that it and other late Ninth Century works were preceded by yet earlier manuals of jurisprudence. The genre of *Uṣūl al-Fiqh* originated several generations earlier than the studies cited above allow.

[3] WAEL B. HALLAQ, *Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?*, in: *International Journal of Middle Eastern Studies* 25 (1993), p. 587-605; WAEL B. HALLAQ, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl al-Fiqh*, Cambridge, 1997, p. 30-35; JOSEPH E. LOWRY, *The Legal-Theoretical Content of the* Risāla *of Muḥammad b. Idrīs al-Shāfiʿī*, Ph.D. Dissertation, University of Pennsylvania, 1999; JOSEPH E. LOWRY, *Does Shāfiʿī Have a Theory of 'Four Sources' of Law?*, in: B.G. WEISS (ed.), *Studies in Islamic Legal Theory*, Leiden, 2002, p. 23-50; ÉRIC CHAUMONT, *al-Shāfiʿī*, in: *EI*2, IX, p. 181-185, esp. 184.

[4] HALLAQ, *History*, p. 30.

[5] CHAUMONT, *al-Shāfiʿī*, p.184.

[6] NORMAN CALDER, *Uṣūl al-Fiḳh*, in: *EI*2, X, p. 931-934 (p. 931).

[7] A. KEVIN REINHART, *Before Revelation: The Boundaries of Muslim Moral Thought*, Albany, 1995, p. 14-15.

[8] DEVIN J. STEWART, *Muḥammad b. Dāʾūd al-Ẓāhirī's Manual of Jurisprudence, al-Wuṣūl ilā Maʿrifat al-Uṣūl*, in: WEISS, *Islamic Legal Theory*, p. 99-158.

The absence of extant works constrains the investigator to adopt two methods for the investigation of the *Uṣūl al-Fiqh* genre, each with its attendant set of difficulties: collecting references to titles and descriptions of works from bibliographies, biographical dictionaries, legal works, and other sources, and reconstruction from fragments and quotations in later works.

The main drawback to the first method is that a book's title reported in another source does not always reveal the topic it discussed, particularly if the title given is partial, truncated, or corrupt. Even when the title in question uses the term *uṣūl*, an important feature of the *Uṣūl al-Fiqh* genre, it is not always clear from the context that *Uṣūl al-Fiqh* is intended. The term *uṣūl* (sing. *aṣl*, literally 'sources' or 'roots') takes on a plethora of meanings in the Islamic sciences: original manuscript copies, original fascicles to be used in teaching or dictation, the major questions or standard topics in any field, dogmatic theology (*Uṣūl al-Dīn*), jurisprudence (*Uṣūl al-Fiqh*), grammatical rules or principles, and so on. This often makes it difficult to identify a particular work as devoted to jurisprudence and not to some other topic. To date, several lists of early *Uṣūl al-Fiqh* works compiled using this method provide a better basis for understanding the development of the genre, but they remain preliminary.[9]

The second method, reconstruction from fragments, is often rendered difficult by the common modes of citation in medieval Islamic scholarship. Authors frequently cite persons rather than specific titles as sources, and often refer to earlier and contemporary authors obliquely, with the result that it is often difficult to assign quoted fragments to specific authors or works. Nevertheless, the collection of fragments has been quite successful for examination of the thought of the pre-Socratics and the Stoics in classical Greek philosophy.[10] In Islamic Studies as well, reconstruction has been used to advantage in partially retrieving lost works such as the *Kitāb al-Mubtada'* of Ibn Isḥāq (d. 150/767), the *Kitāb al-Nakth* of al-Naẓẓām (d. 220-230/835-45), the *Naẓm al-Qur'ān* of al-Jāḥiẓ (d. 255/868), and the *Tafsīr* of Abū ʿAlī al-Jubbāʾī (d. 303/915).[11]

[9] GEORGE MAKDISI, *The Juridical Theology of al-Shāfiʿī: Origins and Significance of* Uṣūl al-Fiqh, in: *Studia Islamica* 59 (1984), p. 5-47, (p. 30-32); HALLAQ, *Architect*, p. 595; DEVIN J. STEWART, *Islamic Legal Orthodoxy: Twelver Shiite Responses to the Sunnī Legal System*, Salt Lake City, 1998, p. 33-36.

[10] HERMANN DIELS, *Die Fragmente der Vorsokratiker*, Berlin, 1903; HANS FRIEDRICH AUGUST VON ARNIM, *Stoicorum veterum fragmenta*, Leipzig, 1905.

[11] GORDON D. NEWBY, *The Making of the Last Prophet: a Reconstruction of the Earliest Biography of Muhammad*, Columbia, 1989; AL-JĀḤIẒ, *Naẓm al-Qur'ān*, ed. SAʿD

AL-ṬABARĪ'S LEGAL STUDIES

Most of what is known about al-Ṭabarī's life, studies, and works derives from a biography quoted extensively in Yāqūt's *Irshād al-Arīb* and written by Abū Bakr Aḥmad b. Kāmil (d. 350/961), a disciple of al-Ṭabarī, adherent of his legal *madhhab*, judge, and prominent scholar of the Qurʾān. Al-Ṭabarī was born in 224-225/839-840 in the city of Āmul in Ṭabaristān. He studied *Ḥadīth* in his youth, studying in Āmul, then Rayy and other towns in Iran. Shortly after the death of Ibn Ḥanbal in 241/855, he came to Baghdad, where he studied *Ḥadīth*, the Qurʾanic sciences, and law. He travelled during this period to nearby Basra, Kufa, and Wāsiṭ in order to study with authorities in *Ḥadīth* there. After some time, al-Ṭabarī travelled to Egypt via Syria, arriving in Fusṭāṭ in 253/867. He travelled to Syria once again, then returned to Fusṭāṭ in 256/870. After this second sojourn in Egypt, he returned to Baghdad, where he would remain until his death in 310/923. He returned twice to his native Ṭabaristān, the second time in 290/902-903.[12]

Biographers of al-Ṭabarī seem intent to show that his legal studies were wide-ranging, including all of the legal schools of thought then in existence. In the *Fihrist*, Ibn al-Nadīm reports that al-Ṭabarī studied Ḥanafī law (*fiqh Ahl al-ʿIrāq*) from a certain Abū Muqātil in al-Rayy, the *Fiqh* of al-Shāfiʿī from al-Rabīʿ b. Sulaymān al-Murādī (d. 270/884) in Fusṭāṭ and al-Ḥasan b. Muḥammad al-Zaʿfarānī (d. 260/874) in Baghdad, and the *Fiqh* of Mālik from Yūnus b. ʿAbd al-Aʿlā (d. 264/879), Saʿd b. ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 268/881), Muḥammad b. ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 268/882), ʿAbd al-Raḥmān b. ʿAbd Allāh b. ʿAbd al-Ḥakam (d. 275/871), and Ibn Akhī Wahb (d.?), presumably in Fusṭāṭ. He also studied law under Dāwūd b. ʿAlī, the founder of the

ʿABD AL-ʿAẒĪM MUHAMMAD, Cairo: Maktabat al-Zahrāʾ, 1995; R. W. GWYNNE, *The* Tafsīr *of Abū ʿAlī al-Jubbāʾī: First Steps Toward a Reconstruction, with Texts, Translation, Biographical Introduction and Analytical Essay*, Ph.D. Dissertation, University of Washington, 1982; D. GIMARET, *Une lecture mu'tazilite du Coran: le* Tafsir *d'Abū ʿAlī al-Djubbāʾī (m. 303/915) partiellement reconstitué à partir de ses citateurs*, Louvain, 1994.

[12] AL-KHAṬĪB AL-BAGHDĀDĪ, *Taʾrīkh Baghdād*, II, Beirut: Dār al-Kutub al-ʿIlmīya, 1980, p.162-169; YĀQŪT AL-ḤAMAWĪ, *Irshād al-Arīb*, XVIII, Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1988, p. 40-94; SEZGIN, *Geschichte*, I, p. 323-328; F. ROSENTHAL, *The History of al-Ṭabarī, vol. I: General Introduction and From the Creation to the Flood*, Albany, 1989, p. 85; C. GILLIOT, *Exégèse, Langue, et Théologie en Islam: l'Exégèse coranique de Tabari (m. 311/923)*, Paris, 1990; C. E. BOSWORTH, *al-Ṭabarī, Abū Djaʿfar Muḥammad b. Djarīr*, in: *EI*2, X, p. 11-15.

Ẓāhirī *madhhab*.[13] Thus, by this account, al-Ṭabarī was versed in Ḥanafī, Mālikī, Shāfiʿī, and Ẓāhirī *Fiqh*. Ibn al-Nadīm distinguishes two types of legal studies on the part of al-Ṭabarī: the verb used to describe his studies under Dāwūd is *qara'a* ('he read'), while that used for the others is *akhadha* ('he took'). This distinction may simply imply that whereas Dāwūd was teaching his own legal scholarship, the other teachers were transmitting the writings of earlier jurists and not teaching their own material.

Ibn Kāmil's description of al-Ṭabarī's legal studies differs from that of Ibn al-Nadīm, omitting mention of Ḥanafī legal studies and stressing al-Ṭabarī's early involvement with the Shāfiʿī legal tradition. According to Ibn Kāmil, al-Ṭabarī began studying law in Baghdad, according to the *madhhab* of al-Shāfiʿī. Al-Ṭabarī copied the 'Book' of al-Shāfiʿī's works from al-Shāfiʿī's student al-Zaʿfarānī and studied it under Abū Saʿīd al-Iṣṭakhrī (d. 328/940) and other teachers.[14] Ibn Kāmil states that this occurred during al-Ṭabarī's first stay in Baghdad, while he was still a youth, before his trip to Egypt. While he may have copied the work from al-Zaʿfarānī early on, it is unlikely that he studied under al-Iṣṭakhrī before his trip to Egypt. Al-Iṣṭakhrī was born in 244/858-859 and would have been under ten when al-Ṭabarī left for Egypt. The 'Book' of al-Shāfiʿī that Ibn Kāmil mentions here is most likely the large legal work, or a collection of works, referred to in the sources as *al-Mabsūṭ*.[15] In Egypt, al-Ṭabarī copied many of the works of Mālik (d. 179/795), Mālik's student Ibn Wahb (d. 197/813), and al-Shāfiʿī.[16] When he arrived in Fusṭāṭ the second time, al-Ṭabarī stayed with al-Shāfiʿī's student and transmitter al-Rabīʿ b. Sulaymān[17] and debated with Ismāʿīl b. Ibrāhīm al-Muzanī (d. 264/878), another of al-Shāfiʿī's prominent disciples, on the topic of consensus.[18] Back in Baghdad, al-Ṭabarī studied law for some time under Dāwūd b. ʿAlī and copied many of his works.[19] The picture that emerges is that al-Ṭabarī had a broad familiarity with the legal texts of the Mālikī, Shāfiʿī, and Ẓāhirī traditions, and studied in all three, with emphasis on the Shāfiʿī

[13] IBN AL-NADĪM, *Al-Fihrist*, ed. RIDĀ TAJADDUD, Teheran: Dār al-Masīrah, 1988, p. 291.

[14] YĀQŪT, *Irshād*, XVIII, p. 52 & p. 53.

[15] IBN AL-NADĪM, *Fihrist*, p. 264, reports that both al-Rabīʿ b. Sulaymān and al-Zaʿfarānī transmitted the *Mabsūṭ* directly from al-Shāfiʿī.

[16] YĀQŪT, *Irshād*, XVIII, p. 52.

[17] YĀQŪT, *Irshād*, XVIII, p. 55-56.

[18] YĀQŪT, *Irshād*, XVIII, p. 53-55.

[19] YĀQŪT, *Irshād*, XVIII, p. 78.

tradition. Like Dāwūd, while he studied primarily in the Shāfiʿī *madhhab* early on, he later adopted an independent legal method and formed a distinct legal *madhhab*. Dāwūd's *madhhab* became known as the Dāwūdī or Ẓāhirī *madhhab*, after the central principle of adherence to the apparent meaning of the scriptural text (*al-ẓāhir*), and al-Ṭabarī's *madhhab* became known as the Jarīrī *madhhab*, after the name of his father. Already in his own lifetime, his followers were known as the Jarīrīya.

AL-ṬABARĪ'S WORKS ON LAW

Reputed to have written forty pages every day for forty years, al-Ṭabarī was by all accounts an extremely prolific author. Two monumental works, the history (*Taʾrīkh al-Rusul wa-l-Mulūk*) and the *Tafsīr* (*Jāmiʿ al-Bayān ʿan Wujūh Taʾwīl Āy al-Qurʾān*), have survived and established his reputation as a leading historian and commentator on the Qurʾān. In his day, however, al-Ṭabarī's fame was probably due as much to his expertise as a jurist. Al-Khaṭīb al-Baghdādī (d. 463/1071), citing Abū Bakr Ibn Kāmil, reports that al-Ṭabarī's opus includes his history, the Qurʾanic commentary, *Tahdhīb al-Āthār* on *Ḥadīth*, and many works on law (*Furūʿ*) and jurisprudence (*Uṣūl*).[20] This statement, presenting the highlights of al-Ṭabarī's literary production, suggests the relative importance of his works on law and legal theory for the immediately following generations.

Al-Ṭabarī wrote four main works on the points of law; fragments of two survive. His first legal work was the *Ikhtilāf al-Fuqahāʾ* or *Ikhtilāf ʿUlamāʾ al-Amṣār*. According to Ibn Kāmil, al-Ṭabarī stated that he first compiled this work as a personal reference for debates on the disputed points of law. When his students found out about it, they insisted that he publish it. Originally 3,000 pages in length, it covered the standard *Fiqh* chapters. In it, al-Ṭabarī presented the opinions of eight earlier legal authorities, the most recent of whom had died in 240/857: Mālik b. Anas (d. 179/795), al-Awzāʿī (d. 157/774), Sufyān al-Thawrī (d. 161/778), al-Shāfiʿī (d. 204/820), Abū Ḥanīfa (d. 150/767), Abū Yūsuf (d. 182/798), al-Shaybānī (d. 189/804-805), and Abū Thawr Ibrāhīm b. Khālid Abū Naṣr al-Kalbī (d. 240/854). He had originally included in it the opinions of Abū Bakr al-Aṣamm (ʿAbd al-Raḥmān b. Kaysān, d. 200/816 or

[20] AL-KHAṬĪB AL-BAGHDĀDĪ, *Taʾrīkh Baghdād*, II, p. 163.

201/817) but later excluded this authority.[21] Notoriously missing from this list of authorities is Aḥmad b. Ḥanbal (d. 241/855), whose dissenting opinions al-Ṭabarī did not consider to carry any legal weight on the grounds that he was merely a scholar of *Ḥadīth* and not a qualified jurist.[22] Two surviving fragments of *Ikhtilāf al-Fuqahā'* have been identified and published, covering the following chapters: *Kitāb al-Jihād* (war against infidels), *Kitāb al-Jizya* (poll-tax), *Kitāb Aḥkām al-Muḥāribīn* (rules governing combatants) (Istanbul ed.); *Kitāb al-Mudabbar* (slaves promised freedom upon the death of their master), *Kitāb al-Buyūʿ* (sales), *Kitāb al-Ṣarf* (barter), *Kitāb al-Salam* (forward buying), *Kitāb al-Muzāraʿa wa-l-Musāqāh* (sharecropping), *Kitāb al-Ghaṣb* (illegal seizure), *Kitāb al-Ḍamān* (guarantees) (Cairo ed.).[23]

Al-Ṭabarī's second major legal work was known as *al-Laṭīf*, short for *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām*. This work was 2,500 pages in length. The term *laṭīf* ('fine, elegant, delicate') in the title was not meant to indicate that it was a short or slight work, as that term often does, but rather referred to the fineness of its argumentation. It treated the points

[21] YĀQŪT, *Irshād*, XVIII, p. 71-72. The text here is a bit confusing: *wa-qad kāna awwalan dhakara fī kitābi-hi baʿḍ ahl al-naẓar, wa-huwa ʿAbd al-Raḥmān b. Kaysān, li-anna-hu kāna fī 'l-waqt alladhī ʿamila-hu mā kāna yatafaqqahu ʿalā madhhabi-hi, fa-lammā ṭāla 'l-zamān bi-hi wa-faqqaha aṣḥāba-hu bi-sahw asqaṭa-hu min kitābi-hi*. First, the phrase *kāna ... mā kāna* seems odd, and should probably be emended to *kāna ... mā zāla*. Second, the verb *yatafaqqahu* here does not mean to study law directly, for al-Aṣamm died before al-Ṭabarī was born. It apparently means that al-Ṭabarī memorized or collected his legal opinions or considered them authoritative. Finally, the antecedents of the various pronouns are unclear; they may refer either to al-Aṣamm or to al-Ṭabarī. GILLIOT, *Exégèse*, p. 42-43, translates the text as follows: "parce que, à l'époque où il composa ce livre, il ne suivait pas encore son propre *maḍhab*; mais, avec le temps, enseignant le *fiqh* à ses disciples (selon son *maḍhab*), il oublia (qu'il avait mentionné al-Aṣamm) et l'omit dans son livre". ROSENTHAL, *General Introduction*, p. 102, apparently reading *wa-faqqaha aṣḥābu-hu bi-sahw*, renders this phrase as "his colleagues and students expressed poorly informed legal views". I would translate the passage as follows: "He (al-Ṭabarī) had at first included in his book a certain scholar of speculative theology, ʿAbd al-Raḥmān b. Kaysān, because at the time he composed it, he was still considering legal opinions according to (al-Aṣamm's) doctrine. When, however, a long time had passed and he inadvertently erred in teaching (al-Aṣamm's) legal opinions to his students, he removed (al-Aṣamm) from the work". Gilliot supposes that al-Ṭabarī was interested in al-Aṣamm's opinions on questions of theology such as the imamate, but it is clear that al-Aṣamm's opinions on the points of law are intended.

[22] YĀQŪT, *Irshād*, XVIII, p. 57-58. Al-Ṭabarī is reported as saying to Ḥanbalī opponents that he had not come across any important opinions of Aḥmad b. Ḥanbal or any important disciples of his legal method.

[23] AL-ṬABARĪ, *Das Konstantinopler Fragment des* Kitāb Iḫtilāf al-Fuqahā', ed. J. SCHACHT, Leiden, 1933; *Hādhā mā Taḥtawī ʿalay-hi Nuskhat al-Maktaba al-Khadīwīya min Kitāb Ikhtilāf al-Fuqahā'*, ed. F. KERN, Cairo: Maṭbaʿat al-Mawsūʿāt and Maktabat al-Taraqqī, 1902.

of law in detail, including all of the chapters included in *Ikhtilāf al-Fuqahāʾ* plus three additional chapters, on clothing, slave women who bear children, and drink. It represented the sum of al-Ṭabarī's *madhhab* (*majmūʿ madhhabi-hi*) and was 'the most valuable of his books and those of the jurists, the best of the major sources of the *madhhab* (*afḍal ummahāt al-madhhab*) and the most soundly organized'. It differed from *Ikhtilāf al-Fuqahāʾ* in that it presented al-Ṭabarī's personal opinion in law (*ikhtiyār*) fully, with full justification.[24] According to Ibn Kāmil, al-Ṭabarī would often say, 'I have two books that the student of law cannot do without: the *Ikhtilāf* and the *Laṭīf*'. *Al-Laṭīf* had appended to it a work on *shurūṭ* or legal documents that Ibn Kāmil refers to by the title *Amthilat al-ʿUdūl min al-Laṭīf*; this is probably identical to the work he mentions separately as simply *Amthilat al-ʿUdūl*.[25] Rosenthal dates the *Laṭīf* prior to the *Ikhtilāf*,[26] but the *Laṭīf* was probably written later. Ibn Kāmil states that the *Ikhtilāf* was the first organized work al-Ṭabarī composed. In Ibn Kāmil's presentation and in his quotation of al-Ṭabarī himself, the *Ikhtilāf* is mentioned first, before the *Laṭīf*. Moreover, the *Laṭīf* included three additional chapters not included in the *Ikhtilāf*, suggesting that it was the later, more complete work. The fact that the *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Dīn* or *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām* is cited in the Cairo edition of *Ikhtilāf al-Fuqahāʾ* must be the result of subsequent redaction and additions to the work on al-Ṭabarī's part.[27]

Al-Ṭabarī wrote a third legal work at the request for an epitome on law by the vizier Abū Aḥmad al-ʿAbbās b. al-Ḥasan al-ʿAzīzī, who held office from 291/904 until 296/908, serving under the ʿAbbasid Caliphs al-Muktafī (r. 291-295/904-908) and al-Muqtadir (r. 295-320/908-932).[28] An abridgement of *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām*, it was entitled *Khafīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām* and was about 400 pages in length.[29] Maḥmūd Muḥammad Shākir has published a passage on the legal status of land conquered by the Muslims at the end of *Musnad ʿAlī*, one of the surviving sections of the *Tahdhīb al-Āthār*, under the title *Mukhtaṣar Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām*. Gilliot believes that this passage belongs to the *Khafīf*.[30]

[24] YĀQŪT, *Irshād*, XVIII, p. 72-74.

[25] YĀQŪT, *Irshād*, XVIII, p. 73 & p. 74.

[26] ROSENTHAL, *General Introduction*, p. 153.

[27] AL-ṬABARĪ, *Ikhtilāf al-Fuqahāʾ*, ed. KERN, p. 79, 83.

[28] See D. SOURDEL, *Le vizirat ʿabbāside de 749 à 936 (132 à 324 de l'Hégire)*, Damascus, 1959-1960, p. 359-376.

[29] YĀQŪT, *Irshād*, XVIII, p. 74.

[30] AL-ṬABARĪ, *Tahdhīb al-Āthār. Musnad ʿAlī*, ed. M.M. SHĀKIR, Cairo: Maṭbaʿat al-Madanī, 1982, p. 289-291; GILLIOT, *Exégèse*, p. 41.

Al-Ṭabarī's fourth and last major legal work was *Basīṭ al-Qawl fī Aḥkām Sharā'iʿ al-Dīn*. He never completed it, but the portion he wrote was 2,000 pages in length. The term *basīṭ* ('extensive', and not 'simple') in the title implies that it was intended to be longer and more comprehensive than his earlier works, and his students were especially eager to study this, his latest work. As an introduction to *Basīṭ al-Qawl*, he wrote another work with the title *Kitāb Marātib al-ʿUlamā'*. Its preface urged young scholars to devote themselves to the study of law, then gave a chronological account of the classes of early legal authorities. In addition, he excerpted from this work a separate book entitled *Kitāb Ādāb al-Quḍāh*, of 1,000 pages in length.[31]

Al-Ṭabarī's minor legal works include *Kitāb Mukhtaṣar Manāsik al-Ḥajj*, on the rites of the pilgrimage, and *Kitāb Mukhtaṣar al-Farā'iḍ*, on inheritance, probably intended for popular usage. In addition, he wrote a refutation of Ibn ʿAbd al-Ḥakam's (d. 268/882) criticism of Mālik and a refutation of Dāwūd b. Khalaf (d. 270/884). The latter, *Kitāb al-Radd ʿalā Dhī 'l-Asfār* ('Refutation of the Book-Bearer'), may conceivably have treated either the points of law or legal theory. The title is a jibe at Dāwūd, alluding to the Qur'anic phrase *ka-mathali 'l-ḥimāri yaḥmilu asfāran* ('like a donkey bearing books': Q. 62: 5), which refers to certain Jewish rabbis.[32]

Al-Ṭabarī's Works on Jurisprudence

Al-Ṭabarī's writings on jurisprudence (*Uṣūl al-Fiqh*) are still less well known than his works on law (*Fiqh*). For example, the recently published article on al-Ṭabarī in the *Encyclopaedia of Islam* ignores them completely.[33] Four titles attributed to al-Ṭabarī could conceivably have treated *Uṣūl al-Fiqh*. One of these, *al-Ādar/al-Ādir fī al-Uṣūl*, al-Ṭabarī reportedly promised to write, but never did.[34] Gilliot believes that the work was intended to discuss someone afflicted with a scrotal hernia (*udra*).[35] This is unlikely, because a title of the form *X fī Y* generally refers to the subject matter in *Y*, while *X* is the name of the work, usually a general descriptive or ornamental term. In this case, the subject

[31] Yāqūt, *Irshād*, XVIII, p. 75-76.

[32] Yāqūt, *Irshād*, XVIII, p. 78-80.

[33] Bosworth, *al-Ṭabarī*, in: *EI*2, X, p. 11-15.

[34] Rosenthal, *General Introduction*, p. 85. The title is reported in Yāqūt, *Irshād*, XVIII, p. 81.

[35] Gilliot, *Exégèse*, p. 50-51, p. 50, n. 4.

matter is probably *al-Uṣūl*, and not *al-Ādar*/*al-Ādir*. The text reporting the title appears to be corrupt. The original title was most likely *al-Nawādir fī 'l-Uṣūl*; *al-ādir* would have resulted from the omission of the two letters *n-w* by a copyist. The term *nawādir* ('rare points, anecdotes') is quite common in book titles from this period; the *Fihrist* includes sixty-eight titles of the form *Kitāb al-Nawādir*, *Kitāb Nawādir Y*, or *Kitāb al-Nawādir fī Y*.[36] The question remains as to what sense of *Uṣūl* was intended. The work could conceivably have focused either on theology or on jurisprudence. A second title attributed to al-Ṭabarī is *al-Mūjaz fī 'l-Uṣūl* ('The Summary, on *Uṣul*'), but the fact that a treatise on ethics (*akhlāq*) was prefaced to the work suggests that it may have focused on theology rather than jurisprudence. Al-Ṭabarī apparently completed the introductory treatise, but did not continue.[37] One cannot say definitely that either of these works was intended to treat *Uṣūl al-Fiqh*, and in any case, al-Ṭabarī did not complete them before his death.

Two other works by al-Ṭabarī certainly treated *Uṣūl al-Fiqh*. The first of these was a work prefaced to the legal work *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Islām*. Ibn Kāmil refers to it as 'the *Risāla* of the *Laṭīf*' and gives it the separate title *al-Bayān ʿan Uṣūl al-Aḥkām*.[38] Al-Tabarī cites both the *Bayān* and *Laṭif al-Qawl* in his famous *Tafsīr*, and he cites the *Bayān* in the extant portion of *Tahdhīb al-Āthār*. The titles by which al-Ṭabarī refers to the *Laṭīf* and the *Bayān* vary quite a bit. He cites the legal or main work as *Kitāb al-Laṭīf* (*Tafsīr*, 4: 465); *Kitāb Laṭīf al-Qawl fī 'l-Aḥkām* (*Tafsīr*, 9: 492), *Kitāb Laṭīf al-Qawl fī Aḥkām al-Sharāʾiʿ* (*Tafsīr*, 11: 12), *Kitāb Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Dīn* (*Tafsīr*, 9: 51), *Laṭīf al-Qawl fī Aḥkām Sharāʾiʿ al-Dīn* (*Tafsīr*, 12: 85), and *Kitāb al-Laṭīf min al-Bayān ʿan Aḥkām Sharāʾiʿ al-Dīn* (*Tafsīr*, 4: 499). He also cites the title of the work on jurisprudence in several different ways. Most frequent is *Kitāb al-Bayān ʿan Uṣūl al-Aḥkām* (*Tafsīr*, 2: 535, 539, 546-547; 3: 244; 5: 40; 8: 169; 10: 333; 14: 57), but variants also appear: *Kitāb al-Laṭīf min al-Bayān* (*Tafsīr*, 4: 365-367), *Kitāb Laṭīf al-Bayān ʿan Uṣūl al-Aḥkām* (*Tafsīr*, 5: 133; 12: 16), *Kitāb al-Laṭīf min al-Bayān ʿan Uṣūl al-Aḥkām* (*Tafsīr*, 5: 414; 12: 273), *Kitāb Laṭīf al-Qawl min al-Bayān ʿan Uṣūl al-Aḥkām* (*Tafsīr*, 4: 514), and *Kitāb al-Risāla min Laṭīf al-Bayān ʿan Uṣūl al-Aḥkām* (*Tafsīr*, 2: 207). The text of *Tahdhīb al-Āthār* gives the title merely as *Kitāb al-Risāla* (*Tahdhīb al-Āthār*, *Musnad ʿAlī*, 34). These citations show that the *Laṭīf*

[36] See IBN AL-NADĪM, *Fihrist*, index 159, 161.

[37] ROSENTHAL, *General Introduction*, p. 113-117; YĀQŪT, *Irshād*, XVIII, p. 81.

[38] YĀQŪT, *Irshād*, XVIII, p. 72 & p. 74.

and the *Bayān* both belong to al-Ṭabarī's earlier works, predating the *Tafsīr* and *Tahdhīb al-Āthār*. Al-Ṭabarī first dictated part of the *Tafsīr* to his students in 270/883-884. He later dictated the complete work between 283/896 and 290/903.[39] Rosenthal's chronology of al-Ṭabarī's works therefore dates the *Laṭif* and the *Bayān* to between 255/869 and 270/883-884, before the composition of the *Tafsīr*, *Ikhtilāf al-Fuqahā'*, and *Tahdhīb al-Āthār*.[40]

Al-Ṭabarī wrote a second work on jurisprudence, similar to the *Bayān*, which he prefaced to *Ikhtilāf al-Fuqahā'*. Ibn Kāmil refers to it as 'the *Risāla* of the *Ikhtilāf*' but does not give a separate title. He states that al-Ṭabarī wrote this work after the *Bayān* and that it included additional material not found in the earlier work. [41] Al-Ṭabarī reportedly removed the treatise at a later date, but Ibn Kāmil's description suggests that he had completed it.[42]

In his later years, al-Ṭabarī planned to write a major work on *Qiyās* or legal analogy. The book-seller Abū 'l-Qāsim al-Ḥusayn b. Ḥubaysh reported that al-Ṭabarī had asked him to collect books devoted to the topic of *Qiyās* for the project, and that he had brought al-Ṭabarī over thirty such works. As it turns out, al-Ṭabarī died before writing the work, and the books were returned.[43]

The Structure and Content of *al-Bayān ʿan Uṣūl al-Aḥkām*

There is little doubt that both *al-Bayān ʿan Uṣūl al-Aḥkām* and the work prefaced to *Ikhtilāf al-Fuqahā'* were manuals of jurisprudence written in an established genre. Ibn Kāmil identifies the subject matter of both works as *Uṣūl al-Fiqh*. The rhyming title *Kitāb al-Bayān ʿan Uṣūl al-Aḥkām* ('The Elucidation of the Sources of Legal Rulings'), with its pointed use of the term *Uṣūl al-Aḥkām* ('the sources of legal rulings'), itself suggests that the topic was well known as the focus of scientific inquiry. Biographical and bibliographical sources

[39] Yāqūt, *Irshād*, XVIII, p. 62; Tāj al-Dīn al-Subkī, *Ṭabaqāt al-Shāfiʿīyah al-Kubrā*, ed. ʿA. al-Ḥilw and M.M. al-Ṭanāḥī, III, Cairo: Hajr, 1992, p. 124.

[40] Ibn Kāmil reports that al-Ṭabarī completed the *Tafsir* in 270 AH. Yāqūt, *Irshād*, XVIII, p. 62; Rosenthal, *General Introduction*, p. 153. Rosenthal points out that this dating is only tentative, since al-Ṭabarī worked on many of his books for a number of years, so that one cannot fix their dates precisely. As stated above, I date the *Laṭīf* after *Ikhtilāf al-Fuqahā'* rather than before it, against Rosenthal's statement here.

[41] Yāqūt, *Irshād*, XVIII, p. 72 & p. 73.

[42] Yāqūt, *Irshād*, XVIII, p. 73; Rosenthal, *General Introduction*, 101-104.

[43] Yāqūt, *Irshād*, XVIII, p. 81.

reveal several other works with similar titles. An identical title is attributed to the Shāfiʿī jurist Ibn Surayj (d. 306/918): *Risālat al-Bayān ʿan Uṣūl al-Aḥkām*.[44] Other similar titles include *al-Wuṣūl ilā Maʿrifat al-Uṣūl*, by Abū Bakr Muḥammad b. Dāwūd al-Iṣbahānī (Ẓāhirī, d. 297/910),[45] *al-Bayān fī Dalāʾil al-Aʿlām ʿalā Uṣūl al-Aḥkām*, by al-Ṣayrafī (Shāfiʿī, d. 330/942),[46] *Kitāb al-Fuṣūl fī Maʿrifat al-Uṣūl*, by Abū Isḥāq Ibrāhīm b. Aḥmad al-Marwazī (Shāfiʿī, d. 340/951),[47] and two works, *Kitāb Naẓm al-Adilla fī Uṣūl al-Milla* and *Kitāb Naẓm al-Aʿlām fī Uṣūl al-Aḥkām* by al-Masʿūdī (probably Ẓāhirī, d. 345/956).[48]

More important evidence concerning the generic identity of the *Bayān* is Ibn Kāmil's detailed list of the topics al-Ṭabarī treated in the work. In the order he lists them, they are:

1. Consensus
2. Traditions Transmitted by Single Authorities.
3. Traditions whose Chains of Authority do not Reach the Prophet.
4. Abrogating and Abrogated Texts on Legal Rulings.
5. Ambiguous and Specified Traditions.
6. Commands and Prohibitions.
7. The Acts of the Messenger.[49]
8. Particular and General Scriptural Texts.
9. *Ijtihād*.
10. The Invalidity of Juristic Preference (*Istiḥsān*).[50]

In all likelihood, this list corresponds closely to the chapters of the work. Ibn Kāmil does not give a complete list of the topics covered in the *Risāla* prefaced to *Ikhtilāf al-Fuqahāʾ*, but the way he describes it suggests that its table of contents was similar if not identical to that of *al-Bayān*. At one point, Ibn Kāmil responds to Muḥammad b. Dāwūd's criticism of al-Ṭabarī for his use of the terms *ijmāʿ* and *khilāf* in *Ikhtilāf*

[44] AL-SUBKĪ, *Ṭabaqāt*, III, p. 456-457.

[45] AL-MASʿŪDĪ, *Murūj al-Dhahab wa-Maʿādin al-Jawhar*, ed. Q. AL-SHAMMĀʿĪ AL-RIFāʿī, IV, Beirut: Dār al-Qalam, 1989, p. 271-272.

[46] IBN AL-NADĪM, *Fihrist*, p. 267; ABŪ ISḤĀQ AL-SHĪRĀZĪ, *Ṭabaqāt al-Fuqahāʾ*, ed. I. ʿABBĀS, Beirut: Dār al-Rāʾid al-ʿArabī, 1970, p. 111.

[47] IBN AL-NADĪM, *Fihrist*, p. 266; AL-SHĪRĀZĪ, *Ṭabaqāt*, p. 112.

[48] AL-MASʿŪDĪ, *Murūj*, I, p. 12-13; AL-MASʿŪDĪ, *Kitāb al-Tanbīh wa-l-Ishrāf*, ed. M.J. DE GOEJE, Leiden, 1984, p. 4-5.

[49] The text has *afʿāl al-rusul* ('acts of the Messengers'), probably for an original *al-rasūl* ('acts of the Messenger, i.e. Muḥammad'), a rubric which commonly appears in later works of jurisprudence.

[50] YĀQŪT, *Irshād*, XVIII, p. 74.

al-Fuqahā' proper. His remarks show that both the *Bayān* and the *Risāla* prefaced to *Ikhtilāf al-Fuqahā'* treated the topic of consensus.[51] Ibn Kāmil describes the contents of the latter work by saying that it included substantial additions (*ziyādāt*) to the *Bayān* in the discussions of 1) consensus and 2) traditions transmitted by single authorities of recognized probity (*akhbār al-āḥād al-ʿudūl*) and some additional material (*shay'an*) in the discussions of 3) traditions whose chains of authority do not reach all the way back to the Prophet (*marāsīl*) and 4) abrogating and abrogated scriptural texts (*al-nāsikh wa-l-mansūkh*).[52] This statement implies that the chapter headings of the two works were essentially the same and that the material included in the chapters not mentioned here, all but four chapters, remained essentially identical in terms of content. Both *al-Bayān ʿan Uṣūl al-Aḥkām* and the work prefaced to *Ikhtilāf al-Fuqahā'* were manuals belonging to the classical genre of *Uṣūl al-Fiqh*, for later exemplars of the genre included chapter headings similar to these. The two works probably date to the late Ninth Century. While *Ikhtilāf al-Fuqahā'* predates the *Laṭīf*, as argued above, the *Bayān* predates the work prefaced to the *Ikhtilāf*. When Ibn Kāmil mentions both texts, the *Bayān* appears first. In addition, the work prefaced to the *Ikhtilāf* contains material not included in the *Bayān*; it was presumably a more advanced, revised version of the latter. This shows, of course, that though this second work on legal theory was intended to appear and be used in conjunction with the *Ikhtilāf*, it was written at a much later date, separately from the original work.[53]

Gilliot has claimed that al-Ṭabarī's work *Bayān* was modeled on the *Risāla* of al-Shāfiʿī.[54] Others have also suggested that the *Bayān* was similar to al-Shāfiʿī's *Risāla*.[55] A comparison of the organization of the two works shows that this is not the case. They differ markedly in structure, method, and content. However, these scholars are correct in noticing an intriguing fact: the *Bayān* was referred to as *al-Risāla*, a title which calls to mind that of al-Shāfiʿī's famous work. Ibn Kāmil refers to the *Bayān*

[51] YĀQŪT, *Irshād*, XVIII, p. 72; ROSENTHAL, *General Introduction*, p. 102-103.

[52] YĀQŪT, *Irshād*, XVIII, p. 73.

[53] Here, I differ with GILLIOT, *Exégèse*, p. 42, who sees that the *Bayān* is a reworking of the *Treatise* on jurisprudence prefaced to the *Ikhtilāf al-Fuqahā'*.

[54] GILLIOT, *Exégèse*, p. 40.

[55] M.M. SHĀKIR, introduction to *Tahdhīb al-Āthār. Musnad ʿUmar*, I, Cairo: Maṭbaʿat al-Madanī, 1982, p. 12; MUḤAMMAD AL-DISŪQĪ, *al-Jānib al-Fiqhī fī Tafsīr al-Ṭabarī*, in: M.T. ABŪ ʿALĪ and M. BIRRĪ (ed.), *al-Imām al-Ṭabarī Faqīhan wa-Muʾarrikhan wa-Mufassiran wa-ʿĀliman bi-l-Qirāʾāt*, I, Beirut: Dār al-Taqrīb, 2001, p. 66-126 (p. 73); MUḤAMMAD RAWWĀS QALʿAH-JĪ, *Fiqh Muḥammad b. Jarīr al-Ṭabarī*, in: *al-Imām al-Ṭabarī*, I, p. 127-151 (p. 135).

as 'the *Risāla* of the *Laṭīf*' and to al-Ṭabarī's other *Uṣūl al-Fiqh* work equally as 'the *Risāla* of the *Ikhtilāf*'. He writes of the *Laṭīf* and the *Bayān*, *wa-li-hādha 'l-kitāb risāla fī-hā 'l-kalām fī uṣūl al-fiqh* ('this book has a *Risāla* in which there is a discussion of jurisprudence').[56] Moreover, al-Ṭabarī himself refers to the *Bayān* as 'the Book *al-Risāla* of the *Laṭīf al-Bayān ʿan Uṣūl al-Aḥkām*' (*Tafsīr*, 2: 207) and simply as *al-Risāla* (*Tahdhīb al-Āthār*, *Musnad ʿAlī*, p. 34). The way in which the term *Risāla* is used in these references suggests that it indicates neither a short independent treatise, as opposed to a book or volume, nor a letter or epistle, the most common meanings of the term. Rather, it seems to be used here to designate a prolegomenon to a larger work. In this case, it seems to indicate a theoretical or methodological prolegomenon, like Ibn Khaldūn's famous *Muqaddima*, the prolegomenon to his lengthy history, *al-ʿIbar*. Al-Ṭabarī seems to have authored several *Risāla*s of this type in addition to the *Bayān*. Mentioned above are the *Risāla* prefaced to *Ikhtilāf al-Fuqahā'* and the *Risālat al-Akhlāq* prefaced to *al-Mūjaz fī 'l-Uṣūl*. Ibn Kāmil also refers to the introduction to al-Ṭabarī's *Tafsīr* as *Risālat al-Tafsīr*.[57] Indeed, in the light of al-Ṭabarī's practice, it is tempting to consider al-Shāfiʿī's famous *Risāla* a prolegomenon of the same type. The *Risāla* may have been intended to serve as a theoretical prolegomenon to al-Shāfiʿī's large legal work, the book preserved and published as *al-Umm* and referred to by Ibn al-Nadīm as *al-Mabsūṭ*.[58] Indeed, al-Ṭabarī's awareness that al-Shāfiʿī's *Risāla* was intended as a prolegomenon to the *Mabsūṭ* may have led him to frame his own works on legal theory as prolegomena to his major works on the points of law. The 'book' he copied from al-Zaʿfarānī during his early days in Baghdad may well have included the *Risāla* as the preface to the *Mabsūṭ*.

Al-Ṭabarī's use of the term *bayān* in the title of this work may also indicate a connection with al-Shāfiʿī. As many have noted, *bayān* is an important term for al-Shāfiʿī. Lowry's work on al-Shāfiʿī demonstrates that the concept of *bayān*, meaning how God expresses legal rules in revelation, provides the structural framework for the *Risāla* as a whole.[59] The fact that al-Ṭabarī uses the term so prominently in the title of this work on jurisprudence, *al-Bayān ʿan Uṣūl al-Aḥkām*, suggests some debt to al-Shāfiʿī's *Risāla*. The term also appears in an *Uṣūl al-Fiqh* work

[56] YĀQŪT, *Irshād*, XVIII, p. 74.

[57] YĀQŪT, *Irshād*, XVIII, p. 63; GILLIOT, *Exégèse*, p. 73.

[58] IBN AL-NADĪM, *Fihrist*, p. 264; AL-SHĀFIʿĪ, *al-Umm*, ed. A.M. SHĀKIR, Cairo: Dār al-Fikr, 1990.

[59] LOWRY, *The Legal-Theoretical Content*, p. 19-61.

attributed to Ibn Surayj, *al-Bayān ʿan Uṣūl al-Aḥkām*, and in a work on jurisprudence attributed to al-Ṣayrafī, *al-Bayān fī Dalāʾil al-Aʿlām ʿalā Uṣūl al-Aḥkām*. In addition, al-Ṭabarī uses the term prominently in the introduction to his *Tafsīr*, which itself bears the title *Jāmiʿ al-Bayān ʿan Wujūh Taʾwīl Āy al-Qurʾān*.[60]

Unfortunately, the extant passages which paraphrase sections of the *Bayān* do not preserve any explicit references to other scholars or earlier works. Nevertheless, an examination of the organization and contents of the work may provide some rudimentary conclusions about its place in the history of the *Uṣūl al-Fiqh* genre. As a basis for comparison with al-Ṭabarī's and other Ninth Century works on jurisprudence, the *Muʿtamad* of Abū 'l-Ḥusayn al-Baṣrī (d. 436/1044) may serve as an example of 'classical' *Uṣūl al-Fiqh*. As seen above, earlier works such as the *Fuṣūl* of al-Jaṣṣāṣ al-Rāzī and the *Taqrīb* of al-Bāqillānī have been published but are incomplete and so cannot serve as completely reliable models. In addition, the introduction to the *Muʿtamad* discusses the order of chapters in *Uṣūl al-Fiqh* works in some detail, showing clearly that al-Baṣrī was striving to impose what he saw as a logical order on the text.[61] The organization of the work is as follows.

1. Literal and Figurative Texts.
2. Linguistic Particles.
3. Commands and Prohibitions.
4. General and Particular Scriptural Texts.
5. Unspecified and Specified Scriptural Texts.
6. Acts of the Prophet.
7. Abrogation.
8. Consensus.
9. *Ḥadīth* reports.
10. Legal Analogy and *Ijtihād*.
11. The Jurisconsult and the Lay Petitioner.

This type of organization, in which questions of linguistic interpretation and analysis precede the discussion of consensus, legal analogy, *Ijtihād*, had become standard by the Fifth/Eleventh Century; most extant works on *Uṣūl al-Fiqh* are organized in a similar fashion.

[60] AL-ṬABARĪ, *Tafsīr al-Ṭabarī: Jāmiʿ al-Bayān ʿan Taʾwīl Āy al-Qurʾān*, ed. M.M. SHĀKIR and A.M. SHĀKIR, I, Cairo: Dār al-Maʿārif, 1961-1969, p. 8-12; GILLIOT, *Exégèse*, p. 73-78.

[61] ABŪ 'L-ḤUSAYN MUḤAMMAD B. ʿALĪ 'L-BAṢRĪ, *al-Muʿtamad fī Uṣūl al-Fiqh*, ed. K. AL-MAYS, I, Beirut: Dār al-Kutub al-ʿIlmīya, 1983, p. 8-9.

The *Bayān* differs quite a bit in structure from the *Muʿtamad* and other later works, and shows a strong resemblance to the manuals of al-Ṭabarī's Ẓāhirī contemporaries, Dāwūd b. ʿAlī and his son Abū Bakr Muḥammad, which have been partially reconstructed. The contents of Dāwūd's putative manual of jurisprudence are:

1. Consensus.
2. Invalidity of *Taqlīd*.
3. Invalidity of Legal Analogy.
4. Traditions Transmitted by Single Authorities.
5. Traditions which Provide Certainty.
6. Incontrovertible Proof.
7. Particular and General Scriptural Texts.
8. Specified and Unspecified Scriptural Texts.

Chapters of Ibn Dāwūd's *al-Wuṣūl ilā Maʿrifat al-Uṣūl*:

1. Introduction.
2. Consensus.
3. Invalidity of *Taqlīd*.
4. Invalidity of Legal Analogy.
5. Invalidity of Juristic Preference.
6. Inference (*Istidlāl*).
7. Invalidity of *Ijtihād*.
8. Prophetic Sunna.
9. General and Particular Scriptural Texts.[62]

Structurally, the *Bayān* appears to differ both from al-Shāfiʿī's *Risāla* and from later manuals of *Uṣūl al-Fiqh*. The topics themselves, many of which are not treated as separate topics by al-Shāfiʿī and do not figure prominently in the organization of his work or in the articulation of his theory of legal interpretation, match those included in later manuals. Their order, however, differs significantly from that found in later *Uṣūl al-Fiqh* works. Later works generally begin by treating matters related to scriptual language, such as commands and prohibitions, particular and general texts, specified and unspecified texts, and so on, then proceed to consensus and *Ijtihād*. The oddity in the *Bayān* is the placement of consensus first, at the beginning of the work, followed by the chapters on *Ḥadīth*, before the discussions of linguistic topics. Moreover, this organization is probably not accidental, attributable to a jumbled presentation

[62] STEWART, *Wuṣūl*, p. 127.

of the topics on the part of Ibn Kāmil, for the *Bayān* shares this feature with the reconstructed manuals of Dāwūd al-Ẓāhirī and Muḥammad b. Dāwūd al-Ẓāhirī. The prominent placement of consensus may indicate that consensus was a subject of intense controversy during al-Ṭabarī's day. As mentioned above, he debated with al-Muzanī on consensus during his sojourn in Egypt. In addition, consensus may have been assigned particular weight or logical significance in legal interpretation during this period. The following quotation by Ibn Dāwūd shows both al-Shāfiʿī's lack of attention to it as a separate topic and his own estimation of its importance for legal interpretation:

> Abū Bakr b. Dāwūd al-Iṣfahānī said: al-Shāfiʿī — may God have mercy on him — ignored, among these levels, consensus, which is one of the principal indicators of the Law. If someone were to justify this, stretching the argument, claiming that consensus indicates (the Law) when it is based on a report, so that (al-Shāfiʿī) made do with mentioning *Ḥadīth* reports, then (one would counter): should he not have mentioned consensus first, and thereby obviated the need to mention legal analogy, since legal analogy depends on consensus? Wouldn't it have been more fitting to mention consensus, since it is logically prior to legal analogy? Then legal analogy would fall under the contents of consensus. This objection could not be refuted.[63]

Here Ibn Dāwūd is criticizing al-Shāfiʿī's organization of the *Risāla* on the grounds first, that it omits consensus as a major category. His argument against the hypothetical objection shows that, in his view at least, consensus is logically prior to analogy, and this may explain why it appears first in his own presentation of *Uṣūl al-Fiqh*. Abū 'l-Ḥusayn al-Baṣrī's explanation of the chapter order in the *Muʿtamad* is also based on this idea of logical priority, though he comes up with quite a different order: literal and figurative texts, linguistic particles, commands, prohibitions, general and particular texts, unspecified and specified texts, acts of the Prophet, abrogation, consensus, *Ḥadīth* reports, and legal analogy. He also has an over-arching category of *khiṭāb* ('discourse, speech') which includes the 'textual' chapters, by which he means everything preceding consensus, as opposed to consensus and legal analogy. He sees that the *khiṭāb* chapters should obviously come first.[64]

To date, I have identified seventeen passages all told, fifteen from the *Tafsīr*, one from *Tahdhīb al-Āthār*, and one from Ibn Kāmil's biography, which quote or refer to specific sections of the *Bayān*. They most often

[63] Al-Juwaynī, *al-Burhān fī Uṣūl al-Fiqh*, ed. Ṣ. B. M. B. ʿUwayda, I, Beirut: Dār al-Kutub al-ʿIlmīya, 1997, p. 40-41.

[64] Al-Baṣrī, *Muʿtamad*, I, p. 8-9.

explain a hermeneutic principle discussed at greater length in the *Bayān*, referring the reader to that more extensive discussion and presenting its conclusion rather than reproducing long passages of the original text. Because the structures of the Qur'anic commentary and *Tahdhīb al-Āthār* differ quite radically from that of a work on jurisprudence, these references do not appear in an order reflecting that of the *Bayān*. The passages refer to or paraphrase material from what appear to be five distinct chapters of the original work. The passage from Ibn Kāmil's biography treats consensus. Six passages treat abrogation (*Tafsīr*, 2: 535; 4: 365-367; 5: 414; 10: 333; 12: 16, 273). Three passages treat commands (*Tafsīr*, 5: 132-133; 14: 57; *Tahdhīb al-Āthār*, *Musnad ʿAlī*, p. 33-34). One passage treats acts of the Messenger (*Tafsīr*, 3: 244). Six passages treat general and particular scriptural texts (*Tafsīr*, 2: 207, 539, 546-547; 4: 514; 5: 40; 8: 169). These correspond to chapters 1, 4, 6, 7, and 8 in the provisional table of contents of the *Bayān* presented above.

Al-Ṭabarī's jurisprudence falls into the category Melchert has labeled 'semi-rationalist', largely associated with the Shāfiʿī *madhhab*.[65] It may be seen to share features with the positions of al-Shāfiʿī himself, Dāwūd b. ʿAlī, Muḥammad b. Dāwūd, and perhaps such figures as Ibn Surayj. Like these other scholars, al-Ṭabarī must have been acutely aware of al-Shāfiʿī's *Risāla* but at the same time conscious that that work failed quite radically to adhere to the generic conventions of *Uṣūl al-Fiqh* in his own day. The extant references to the *Bayān* in al-Ṭabarī's other works provide a general idea of his positions on some questions of jurisprudence, showing, in general, that he had strong scripturalist leanings. According to al-Ṭabarī, consensus is the transmission by many authorities of reports on which the Companions of the Prophet Muhammad agreed unanimously. He thus appears, like Dāwūd, to restrict consensus historically. Al-Ṭabarī also shares with Dāwūd the opinion that a consensus cannot occur on the basis of legal analogy, but rather must be tied to a text. A scriptural command, in his view, is ordinarily understood to indicate obligation. Scriptural texts that promise reward for doing something or threaten punishment for not doing something may be considered equivalent to commands. While commands may indicate recommendation or guidance rather than obligation, one is only allowed to interpret them thus if God has so indicated explicitly. The command of the Prophet may not always indicate obligation, but in cases where it

[65] C. MELCHERT, *The Formation of the Sunni Schools of Law, 9th-10th Centuries C.E.*, Leiden, 1997, p. 69-70, 74-76, 80, 83-86.

does not, the Prophet indicates this in other ways. The default position concerning general and particular scriptural texts is that general expressions are to be interpreted as applying generally even if it is known that a verse was revealed in response to a particular situation. A general expression may only be rendered particular by another explicit text. If a different ruling applies to a subset of a category, the general ruling does not lose force, but still applies to the remainder of the category. Al-Ṭabarī limits abrogation to cases where ruling A is completely rescinded by ruling B and not modified, partially rescinded, or stricken under certain circumstances. He also requires a reliable report concerning the abrogation.

These glimpses of the theoretical content of the *Bayān* suggest that he was arguing primarily against Ḥanafī theorists who adopted a less strict scriptural or textual approach. He argues against jurists who allow consensus to be formed without a textual basis and without tracing an issue back to the generation of the Companions. We also note from al-Ṭabarī's comments that he is concerned to restrict the definition of abrogation. He argues against jurists who identify instances of abrogation through rational inquiry, expanding the category of *naskh* considerably by identifying logical contradictions in the text. He argues against those who would consider general texts particular without a textual basis. All of these are positions associated more strongly with Ḥanafīs than with jurists of the other *madhhab*s.

The invalidity of *Istiḥsān* or juristic preference, the last topic cited in Ibn Kāmil's contents of al-Ṭabarī's work, stands out. It is the only topic in his work framed as a rejection, a rejection the *Bayān* shares with Ibn Dāwūd's *Wuṣūl*. If al-Ṭabarī and Ibn Dāwūd had been presenting their own methods in a new form or genre, it would have been unnecessary to reject the method of *Istiḥsān*, particularly as a chapter in its own right. This suggests that both books were responding to other works which upheld the method of *Istiḥsān* as part of a full presentation of *Uṣūl al-Fiqh*, most likely in a distinct chapter. The only jurists who would have done this are Ḥanafīs, for Shāfiʿīs, Mālikīs, and Ḥanbalīs generally rejected *Istiḥsān*, and al-Shāfiʿī himself had written a treatise on the invalidity of *Istiḥsān*.[66]

Scholars who have singled out Ibn Surayj either as the inventor of *Uṣūl al-Fiqh* or as the direct source of its inspiration in the work of his students are correct in characterizing his legal theory as a compromise of

[66] Published with AL-SHĀFIʿĪ, *Umm*, VII, p. 309-320.

sorts, between the theories of the proponents of *Raʾy* and those of the traditionalists. They are probably wrong, however, in seeing that this synthesis itself is what created the genre of *Uṣūl al-Fiqh*.[67] Jurists in the Shāfiʿī tradition — al-Shāfiʿī himself, his student al-Muzanī, Ibn Surayj, and presumably Dāwūd, Ibn Dāwūd, and al-Ṭabarī as well, were reacting in large part to the legal works of the Ḥanafīs, including Muḥammad b. al-Ḥasan al-Shaybānī and others. Melchert points out that al-Shāfiʿī, al-Muzanī, and Ibn Surayj all used al-Shaybānī's legal categories in their own works on law.[68] It seems very likely that they were reacting to Ḥanafī works on jurisprudence and legal theory as well, and that they were adopting a form that the Ḥanafīs had originated.

The genre of *Uṣūl al-Fiqh* is unlikely to have originated among the traditionalists, such as the Ḥanbalīs, who were opposed to theoretical discussions of this nature. The same seems to be the case with the western Mālikīs, though the eastern Mālikīs probably composed *Uṣūl al-Fiqh* works by the late Ninth Century. Jurists associated with the Shāfiʿī tradition such as Dāwūd, al-Ṭabarī, and Ibn Surayj were certainly working in the genre, but they could not have derived the form from al-Shāfiʿī himself. His *Risāla*, even though it presents a theory of legal intepretation, was quite different from classical *Uṣūl al-Fiqh* manuals in that it did not list principles and lacked most of the topical chapters found in such works. Therefore, al-Ṭabarī and his contemporaries must have been reacting to jurists writing in the Ḥanafī tradition. The conclusion to be drawn is that there existed an important Ḥanafī tradition of jurisprudence, comprising manuals generically related to the classical works of *Uṣūl al-Fiqh*, to which such jurists as al-Ṭabarī, Dāwūd, and Ibn Dāwūd were responding.

Traces of an Early Tradition of *Uṣūl al-Fiqh*

The most likely authors of the earliest manuals of *Uṣūl al-Fiqh* were Ḥanafī jurists, Basran adherents of the school of *Raʾy*, and the Basran and Baghdadi Muʿtazilīs. Bibliographical hints and fragments seem to confirm the existence of such a tradition, beginning as early, possibly, as the late eighth century with the work of Abū Ḥanīfa's famous disciple al-Shaybānī.

Muḥammad b. Ḥasan al-Shaybānī, the famous jurist whose works would become the mainstay of the Ḥanafī *madhhab*, was born in Wāsiṭ

[67] Hallaq, *Legal Theories*, p. 33; Reinhart, *Before Revelation*, p. 14-15.
[68] Melchert, *Formation*, p. 91.

in 132/749-750. He grew up in Kufa, where he studied with Abū Ḥanīfa, then Abū Yūsuf. At the age of twenty, he already had his own teaching circle in the mosque of Kufa. Later, he taught in Baghdad. He was eventually appointed judge in al-Raqqa after coming to the attention of the ʿAbbasid Caliph Hārūn al-Rashīd (r. 170-193/786-809). He died in 189/805 in al-Rayy, while accompanying the Caliph to Khurasan.[69] Though Ibn al-Nadīm attributes to him a *Kitāb Uṣūl al-Fiqh*, Hallaq argues that this work treated the points of law rather than jurisprudence. Hallaq is correct in pointing out that Ibn al-Nadīm sometimes uses the term *uṣūl* in reference to works that treat the standard points of law. For example, the notice on Abū Ḥanīfa's disciple Abū Yūsuf in the *Fihrist* reads:

> Abū Yūsuf has the following books [or chapters], in (the form of) *uṣūl* and dictations (*li-Abī Yūsuf min al-kutub fī 'l-uṣūl wa-l-amālī*): *Kitāb al-Ṣalāh, Kitāb al-Zakāh, Kitāb al-Ṣiyām, Kitāb al-Farā'iḍ* ... [70]

The notice on the Ḥanafī jurist Ibn Samāʿa (d. 233/847-848) includes the statement, 'he has books organized by chapter and *uṣūl* on *Fiqh* (*wa-lahu kutub muṣannafa wa-uṣūl fī 'l-fiqh*).[71] The term *uṣūl* as used here is to be contrasted with *kutub muṣannafa* ('compiled books'), that is, organic works which are made up of a series of chapters unified by a common structure. *Uṣūl* are individual fascicles or dictated texts which stand alone, or originally stood alone before being collated into a larger work. Context may allow us to differentiate this usage of *uṣūl* from that referring to jurisprudence. In his notice on al-Shaybānī, Ibn al-Nadīm uses the term *uṣūl* twice. While both instances possibly refer to *Fiqh* works, it is entirely possible that one instance refers to jurisprudence or legal theory instead. The first instance of *uṣūl* clearly refers to the major chapters of law: *wa-li-Muḥammad fī 'l-uṣūl kitāb al-ṣalāh, kitāb al-zakāh, kitāb al-manāsik, kitāb nawādir al-ṣalāh* etc. In the second instance, Ibn al-Nadīm attributes a work to him a work entitled *Kitāb Uṣūl al-Fiqh*.[72] The context suggests that this is a distinct reference to a work on jurisprudence now lost, rather than a redundant reference to the *Fiqh* work mentioned previously. Melchert affirms this possibility. Chaumont argues that al-Shaybānī wrote on legal theory, noting, in addition to the *Kitāb Uṣūl al-Fiqh* just discussed, two other works attributed

[69] Ibn al-Nadīm, *Fihrist*, p. 257-258; al-Khaṭīb al-Baghdādī, *Taʾrīkh Baghdād*, II, p. 172-182; É. Chaumont, *al-Shaybānī*, in: *EI*2, IX, p. 392-394.

[70] Ibn al-Nadīm, *Fihrist*, p. 256-257

[71] Ibn al-Nadīm, *Fihrist*, p. 258-259

[72] Ibn al-Nadīm, *Fihrist*, p. 258-259

to him by Ibn al-Nadīm, *Kitāb Ijtihād al-Ra'y* and *Kitāb al-Istiḥsān*, and references to his opinions in later *Uṣūl al-Fiqh* works.[73] If true, this attribution would indicate that the genre of *Uṣūl al-Fiqh* manuals actually predates al-Shāfi'ī's *Risāla*. Al-Shāfi'ī could have been reacting against an early work on jurisprudence, perhaps that of al-Shaybānī himself, rather than inventing the genre.

Abū 'Ubayd al-Qāsim b. Sallām (d. 224/838-839), born in Herat ca. 157/773, studied from his twenties on in Baghdad and in Basra and eventually settled in the former. He gained renown as a philologist and scholar of *Ḥadīth*, but also served as a jurist of some standing. During the administration of Thābit b. Naṣr b. Mālik as governor of the Syrian Marches, he was appointed as judge in Tarsus, a position he held between 192/807 and 210/825. He subsequently returned to Baghdad, taking up residence on the Darb al-Rayḥān. He died in 224/838-839 in Mecca, having moved there some years prior. Abū 'Ubayd's *madhhab* adherence is disputed. He is claimed by both the Shāfi'īs and the Ḥanafīs; others report that he followed the legal method of al-Wāqidī (d. 207/823); still others claim that he adopted the opinions of Mālik and al-Shāfi'ī indiscriminately. It seems most reasonable to attribute to him a loose affiliation with the Ḥanafīs, because he is reported to have studied under al-Shaybānī and to have praised him highly. The fact that he served as judge during this period also suggests a Ḥanafī affiliation. His only extant work treats abrogation.[74] In *Ikhtilāf Uṣūl al-Madhāhib*, a refutation of Sunnī jurisprudence, al-Qāḍī al-Nu'mān (d. 363/974) cites a crucial passage by this jurist:

> The sources of legal rulings (*uṣūl al-aḥkām*) which a judge cannot transgress to adopt others are: the Book, the *Sunna*, and what the leading jurists and righteous ancestors have ruled on the basis of consensus and *Ijtihād*. There is no fourth category. *Ijtihād* in our view only refers to selection from these opinions if they differ or contradict one another by careful consideration and assiduous pursuit of what is closest to rectitude and correctness. If a case is brought for judgement which does not occur in the same exact form among these items (*khiṣāl*), the judge may use them as relevant examples or bases for comparison, but may not depart from them altogether.[75]

[73] IBN AL-NADĪM, *Fihrist*, p. 257-258; CHAUMONT, *al-Shaybānī*.

[74] AL-KHAṬĪB AL-BAGHDĀDĪ, *Ta'rīkh Baghdād* XII, p. 403-416; J. BURTON, *Abū 'Ubaid al-Qāsim b. Sallām's* K. al-Nāsikh wa-l-Mansūkh *(MS Istanbul, Topkapı, Ahmet III A 143)*, Cambridge, 1987, p. 46-50; MELCHERT, *Formation*, p. 75-76; MELCHERT, *Qur'ānic Abrogation Across the Ninth Century: Shāfi'ī, Abū 'Ubayd, Muḥāsibī, and Ibn Qutayba*, in: WEISS, *Islamic Legal Theory*, p. 75-98 (p. 77-78).

[75] AL-QĀDĪ AL-NU'MĀN, *Ikhtilāf Uṣūl al-Madhāhib*, ed. S. T. LOKHANDWALLA, Simla, 1972, p. 212.

This passage clearly presents a legal theory based on the concept of sources of the law (*Uṣūl*), the idea which appears to be at the heart of the *Uṣūl al-Fiqh* genre, but which is conspicuously lacking in al-Shāfiʿī's *Risāla*. It seems quite likely that Ibn Sallām's statement above derives from a work on the topic of *Uṣūl al-Aḥkām*. In writing *Ikhtilāf Uṣūl al-Madhāhib*, al-Qāḍī al-Nuʿmān certainly had recourse to a large number of Sunnī manuals of jurisprudence, and he may have retrieved this statement from such a manual by Ibn Sallām. No identifiable work on jurisprudence is attributed to him in extant sources, but a *Kitāb Adab al-Qāḍī* appears, and the statement above certainly seems to be set in the context of judgeship.

Ibrāhīm b. Sayyār al-Naẓẓām (d. 221/836) is cited frequently in later *Uṣūl al-Fiqh* works on particular issues such as the invalidity of consensus. He is cited frequently in the work of his student, al-Jāḥiẓ (d. 255/869), entitled *Kitāb Uṣūl al-Futyā wa-l-Aḥkām*. Since this work appears to have been a manual of jurisprudence, there is a strong possibility that al-Naẓẓām composed a manual of jurisprudence on which al-Jāḥiẓ relied, and from which his opinions on various topics in legal theory, including consensus and legal analogy, presumably derive. Al-Jāḥiẓ dedicated *Kitāb Uṣūl al-Futyā wa-l-Aḥkām* to the Ḥanafī, Muʿtazilī judge Aḥmad b. Abī Duwād al-Iyādī (d. 240/854). Ibn Abī Duwād held the position of chief judge in Baghdad between 218/833 and 237/851-852. He was first appointed by the ʿAbbasid Caliph al-Muʿtaṣim (r. 218-227/833-842) and retained this position, with his son Abū 'l-Walīd Muḥammad as deputy, until they were both dismissed early in the reign of al-Mutawakkil (r. 232-247/847-61). Al-Jāḥiẓ must have composed *Kitāb Uṣūl al-Futyā wa-l-Aḥkām* before 233/848, because he completed *Kitāb al-Ḥayawān*, where the work on jurisprudence is mentioned, in that year.[76]

Abū Muḥammad Yaḥyā b. Aktham al-Ṣayfī (d. ca. 242/857) was born in Basra ca. 181/796. He studied *Ḥadīth* and law in Basra in his youth. He has generally been claimed for the Ḥanafīs, though Melchert assigns him to a distinct Basran school of *Raʾy*. He was appointed judge of Basra in 202/817-818. Shortly after being removed from his post in 210/825, he was appointed chief judge in Baghdad, having attracted the favour of the caliph al-Maʾmūn. He travelled with al-Maʾmūn to Egypt

[76] AL-JĀḤIẒ, *al-Rasāʾil*, ed. ʿA.M. HĀRŪN, I, Beirut: Dār al-Jīl, 1991, p. 309-319; AL-JĀḤIẒ, *Kitāb al-Ḥayawān*, I, Cairo: al-Maṭbaʿa al-Ḥamīdīya al-Miṣrīya, 1905-1907, p. 9. On Ibn Abī Duwād, see K.V. ZETTERSTÉEN and Ch. PELLAT, *Aḥmad b. Abī Duʾād*, in: *EI*2, I, p. 271. On al-Jāḥiẓ, see Ch. PELLAT, *al-Djāḥiẓ*, in: *EI*2, II, p. 385-387.

in 217/832, but fell from favour. Al-Muʿtaṣim appointed as his replacement Aḥmad b. Abī Duwād b. ʿAlī (d. 240/854), renowned as the chief proponent of the Muʿtazilī Inquisition. In 237/851, when al-Mutawakkil ended the Inquisition, he dismissed Ibn Abī Duwād, then suffering from paralysis, together with his son, who had been acting as deputy, and appointed Yaḥyā chief judge once again.[77] Yaḥyā was dismissed again after several years for pederasty and replaced with Jaʿfar b. ʿAbd al-Wāḥid (d. 258/871-872). He died soon thereafter, ca. 242/857. Al-Masʿūdī reports that he wrote a number of works on law, including both the points of law (*Furūʿ*) and jurisprudence (*Uṣūl*), in addition to a book called *Kitāb al-Tanbīh* refuting the Iraqis, that is, the Ḥanafī jurists.[78]

Ḥusayn b. ʿAlī al-Karābīsī (d. 248/862-863) seems to be an exception, for he was not Ḥanafī, Muʿtazilī, or affiliated with the rationalist upholders of *Raʾy*. He nevertheless is listed by two biographical dictionaries as having written on both the *Uṣūl* and *Furūʿ* of *Fiqh*. Al-Karābīsī was a student of al-Shāfiʿī, but seems not to have been extremely traditionalist. He is known to have had altercations with Aḥmad b. Ḥanbal because he held that, while the text of the Qur'an is eternal, one's recitation of it is not.[79]

Although affiliated with the Mālikīs, another jurist who belongs in this group is Ismāʿīl b. Isḥāq b. Ḥammād al-Azdī. Ismāʿīl's father Isḥāq had close ties with Yaḥyā b. Aktham, mentioned above. He was a jurist as well, presumably associated with the Basran school of *Raʾy* identified by Melchert.[80] Sent to Egypt along with Ibn Abī Duwād to accompany the caliph al-Muʿtaṣim, he served there as judge of grievances (*al-maẓālim*). His son Ismāʿīl was appointed judge of the East Side of Baghdad by al-Mutawakkil in 245/860 upon the death of Sawwār b. ʿAbd Allāh. In 258/871-872, he was appointed judge of the West Side, and he retained this position until his death in 282/896. He inaugurated a long line of Mālikī judges in Baghdad, and seems to have promoted a jurisprudence of compromise, blending the methods of the adherents of *Raʾy* and the traditionalists.[81] Al-Qāḍī ʿIyāḍ (d. 544/1145) reports that he wrote a work on *Uṣūl*, and the Mālikī jurist Ibn al-Qaṣṣār cites him in

[77] AL-MASʿŪDĪ, *Murūj*, IV, p. 13, 24-26, 93; MELCHERT, *Formation*, p. 43-46.

[78] AL-MASʿŪDĪ, *Murūj*, IV, p. 26.

[79] MUḤAMMAD B. AḤMAD AL-ʿABBĀDĪ, *Kitāb Ṭabaqāt al-Fuqahāʾ al-Shāfiʿīya*, ed. G. VITESTAM, Leiden, 1964, p. 24-25; AL-SHĪRĀZĪ, *Ṭabaqāt al-Fuqahāʾ*, p. 102; MELCHERT, *Formation*, p. 71. HALLAQ, *Architect*, p. 602, n. 23, doubts that al-Karābīsī's work treated jurisprudence per se.

[80] MELCHERT, *Formation*, p. 41-47.

[81] MELCHERT, *Formation*, p. 46-47, 88-89, 170-175.

his *Muqaddima*.[82] Given his career, it is not surprising that he wrote a manual of *Uṣūl al-Fiqh*. Such a work could have exerted significant influence on such jurists as Ibn Surayj and Muḥammad b. Dāwūd, who served as his assessors or advisors as judge of Baghdad's West Side.[83]

That the Ḥanafī tradition was active in inventing the *Uṣūl al-Fiqh* genre is not so surprising. The majority of judges in the ʿAbbasid capital and the major cities of the Empire belonged to the Ḥanafī tradition. They would have needed works on jurisprudence the most, and the patronage associated with such lucrative posts would have provoked competition among jurists in writing such works to establish their credentials. Given that the earliest work we know about with any certainty was written by al-Jāḥiẓ and dedicated to Ibn Abī Duwād, it would also appear that early Muʿtazilis played an important role in shaping the genre. Ḥanafī and Muʿtazilī theorists thus made two waves of contributions to the devloping genre of *Uṣūl al-Fiqh*. Ḥanafī jurists such as al-Shaybānī, Muʿtazilī theorists such as al-Naẓẓām and al-Jāḥiẓ, and semi-Ḥanafī adherents of the Basran school of *Raʾy* such as Yaḥyā b. Aktham probably developed the genre in its first stages. The second wave of Ḥanafī/Muʿtazilī influence came later, through the writings of such figures as Abū ʿAlī al-Jubbāʾī (d. 303/915-916), Abū Hāshim al-Jubbāʾī (d. 321/933), Abū 'l-Ḥasan al-Karkhī (d. 340/952), and Abū ʿAbd Allāh al-Baṣrī (d. 369/979-980), culminating in the works of al-Qāḍī ʿAbd al-Jabbār (d. 425/1015) and Abū 'l-Ḥusayn al-Baṣrī. Particularly through al-Qāḍī ʿAbd al-Jabbār's seminal work *al-ʿUmad*, mentioned prominently by Ibn Khaldūn and others, Muʿtazilī *Uṣūl al-Fiqh* was established as part of mainstream legal theory. Between these two waves of contributions, a group of semi-rationalists, including such thinkers as Dāwūd b. ʿAlī, his son Abū Bakr Muḥammad, Ibn Surayj, and al-Ṭabarī, reacted to earlier works in the genre and modified it in particular by rejecting *Raʾy* and *Istiḥsān*. The Mālikī judge Ismāʿīl b. Isḥāq seems to be a transitional figure between the early rationalists and the semi-rationalists of the late Ninth and early Tenth Centuries. While he came from a rationalist background, he belonged squarely with the semi-rationalists and seems to have been a nexus around which their important theorists, including Ibn

[82] AL-QĀDĪ ʿIYĀḌ, *Tartīb al-Madārik wa-Taqrīb al-Masālik li-Maʿrifat Aʿlām Madhhab Mālik*, IV, ed. A.B. MAḤMŪD, Beirut: Maktabat al-Ḥayāh, 1967, p. 282; IBN AL-QASSĀR, *Muqaddima*, p. 88, 127.

[83] L. MASSIGNON, *La Passion de Husayn Ibn Manṣūr Hallāj: martyr mystique de l'Islam, executé à Bagdad le 26 mars 922: étude d'histoire religieuse*, Paris, 1975; L. MASSIGNON, *The Passion of al-Ḥallāj, Mystic and Martyr of Islam*, trans. H. MASON, I, Princeton, 1982, p. 338-361.

al-Surayj and Muḥammad b. Dāwūd, gathered. Another figure central in patronizing and promoting the semi-rationalists was ʿAlī b. ʿĪsā (d. 334/945), who served as vizier in 301-304/913-917 and in 315-316/927-928.[84]

Why do we know so little about early Ḥanafī manuals of jurisprudence? The first reason is the ravages of time: the vast majority of the early works in this and other genres were simply lost. The second reason has to do with the nature of the genre. Manuals of jurisprudence were textbooks in a rapidly changing and developing scientific field. As students clamored for the latest, most advanced manuals, earlier works were left aside, just as one would abandon old chemistry textbooks today. Perhaps even more important, though, was the third reason, a major ideological shift that coincided with the end of the Muʿtazilīs' heyday in the mid-Ninth Century. The chief feature of this shift was the rejection of *Raʾy* and *Istiḥsān* as acceptable principles of jurisprudence independent of scripture. It is likely that early Ḥanafī/Muʿtazilī works of jurisprudence listed *Raʾy*, *Istiḥsān*, or *Ijtihād al-Raʾy* as independent *Uṣūl* or sources of the law. After this shift, even the Ḥanafīs themselves would not have been keen on preserving such works, and they may even have played a role in suppressing elements of their own tradition, erasing for posterity traces of their existence and rendering the task of the historian that much more difficult.

The genre of *Uṣūl al-Fiqh* had clearly become extremely important by al-Ṭabarī's later years, to such an extent that it may be considered a feature of the institution of the *Madhhab*, intimately connected with the professionalization of the jurists in the course of the Ninth Century. George Makdisi has stressed the important relationship between the forms works adopt and the curriculum and methods of legal education. He sees that the *Wāḍiḥ* of Ibn ʿAqīl (d. 513/1119), for example, with its inclusion of doctrine (*Madhhab*), dialectic (*Jadal*), and disputed questions (*Khilāf*), mirrors the structure of legal education itself, stating, 'the *Wāḍiḥ* represents the complete college curriculum of legal studies leading to the doctorate of law'.[85] It is tempting to make a similar statement about the works of al-Ṭabarī. Al-Ṭabarī's decision to preface the *Bayān* to a work he considered indispensable for his legal students and to preface a similar work on jurisprudence to the equally indispensable *Ikhtilāf*

[84] MELCHERT, *Formation*, p. 112-114; MASSIGNON, *Passion*, I, p. 409-410; SOURDEL, *Vizirat*, p. 399-406, p. 441-448, p. 519-551.

[85] G. MAKDISI, *Ibn ʿAqīl: Religion and Culture in Classical Islam*, Edinburgh, 1997, p. 69-72.

indicates the importance he saw in them for legal education. He not only found these two works useful and informative for his students, but also considered *Uṣūl al-Fiqh* an essential component of the education which characterized the legal *Madhhab*s. His work *Laṭīf* was, in a sense, similar to Ibn ʿAqīl's *Wāḍiḥ*, a complete legal education in the Jarīrī *Madhhab*.

The genre of *Uṣūl al-Fiqh* manuals probably originated among Ḥanafī jurists and Muʿtazilī theorists very early, in the late Eighth or early Ninth Century. Jurists in the Shāfiʿī tradition may have done a great deal to shape the tradition, but certainly did not invent it. It most likely originated in the ʿAbbasid capital, Baghdad, or the nearby centres of Basra and Kufa. The early tradition was probably tied with the ʿAbbasids' patronage and judicial appointments. In addition, one may consider it a major criterion for determining the existence of a legal *Madhhab*. By the late Ninth Century, nearly all of the established *Madhhab*s had one or more manuals of *Uṣūl al-Fiqh*. The Ḥanafīs had manuals from 233/848 at the latest, with al-Jāḥiẓ's *Uṣūl al-Futyā wa-l-Aḥkām*. The Shāfiʿīs had manuals by the time of al-Karābīsī, Ibn Surayj, and probably others. The Mālikīs had the manual of Ismāʿīl b. Isḥāq b. Ḥammād. The Ẓāhirīs had Muḥammad b. Dāwūd's *al-Wuṣūl ilā Maʿrifat al-Uṣūl* as well as, probably, a manual by Dāwūd. The Jarīrīs had *al-Bayān ʿan Uṣūl al-Aḥkām* by the master himself. The only Sunnī *madhhab* which appears late in this regard is that of the Ḥanbalīs, for whom there is not an identifiable manual of *Uṣūl al-Fiqh* until that of Ibn Shāqillā (d. 369/979), though this may reflect merely the incomplete coverage of extant sources.

By the late Ninth Century, semi-rationalists such as Dāwūd, al-Ṭabarī, Ibn Dāwūd, and Ibn Surayj wrote manuals of *Uṣūl al-Fiqh* in which they drew on al-Shāfiʿī's theories of legal interpretation but presented them in a radically different form. Arguing primarily against Ḥanafī theories, they had probably adopted the formal conventions of a genre developed largely by the Ḥanafīs. With the fall of the Muʿtazilīs from power and the onset of a traditionalist backlash against the proponents of *Raʾy*, Ḥanafī jurisprudence itself had to change. An anachronistic traditionalist pedigree was produced, and the rationalist excesses of the past were covered up. This ideological shift in the course of the Ninth Century is seen in al-Ṭabarī's initial inclusion and later omission of the legal opinions of the Muʿtazilī al-Aṣamm from his work *Ikhtilāf al-Fuqahāʾ*. The *Fuṣūl* of al-Jaṣṣāṣ provides an example on the part of the Ḥanafīs themselves. He explicitly excludes Muʿtazilīs from his work and cites few earlier Ḥanafī authorities besides his teacher, Abū 'l-Ḥasan al-Karkhī, and ʿĪsā b.

Abān, who had some credibility as a scholar of *Ḥadīth*. It is to be hoped that further research may reveal more about the early Ḥanafī traditon of *Uṣul al-Fiqh*, despite this sort of obfuscation.

DEVIN J. STEWART
Emory University